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No. 73-561

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE HARVEY DIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court's denial of his motion to dismiss the indictment against him, made after the trial judge had granted his motion for a mistrial, was an appealable order.

Petitioner's jury trial on a charge of having stolen twelve ladies' coats, in violation of 18 U.S.C. 659, began in the United States District Court for the Northern District of California on March 26, 1973. The evidentiary phase of the trial was concluded on the afternoon of the third day (Tr. 383). After the judge instructed the jury on that afternoon and the following morning (Tr. 384-406, 407-421), the jury retired to deliberate at 12:10 p.m. (Tr. 423-424). At 3:40 p.m., in response to a request from the jury, the judge reinstructed the jurors on the element of intent (Tr. 425-427). At 5:30 p.m., the judge called the jurors back and inquired about the progress of their deliberations (Tr. 427). The jurors

reported that they were "rather deadlocked as to certain points in the case" (Tr. 428). The jurors stated that one cause of their disagreement was confusion over the issue of intent; it appeared to them that the judge's second instruction in regard to the element of intent had differed from his initial instructions (Tr. 428-432).

The judge then called counsel into chambers, and petitioner's counsel moved that the jury be dismissed on two grounds—because it was deadlocked and because the difference in the court's two instructions was prejudicial (Tr. 434-436). When the court reconvened after the chambers discussion, the judge declared a mistrial due to the jury's inability to reach a verdict (Tr. 437-438). Petitioner subsequently moved for dismissal of the indictment, contending that another trial would violate his right not to be subject to double jeopardy; this motion was denied. Petitioner's appeal from the denial of the motion was dismissed as nonappealable under 28 U.S.C. 1291 (Pet. App. A).

The court of appeals correctly ruled that the denial of petitioner's motion for dismissal of the indictment could not be appealed. See *DiBella* v. *United States*, 369 U.S. 121. Petitioner incorrectly contends that the decision below conflicts with *United States* v. *Lansdown*, 460 F. 2d 164 (C.A. 4). The court in *Lansdown* explicitly stated that its decision did not apply "to those cases where the mistrial is declared at the request of the defendant since in those cases the defendant has waived any claim of double jeopardy" (460 F. 2d at 171, n. 8).

Petitioner claims (Pet. 8) that his motion for mistrial was forced upon his counsel and was merely ceremonial. There is nothing in the record to support this assertion. To the contrary, it is clear that petitioner's counsel

strongly urged that a mistrial be declared and that neither the trial judge nor the prosecution invited or encouraged such a motion. In these circumstances, petitioner's underlying double jeopardy claim is clearly without merit. See *United States* v. *Tateo*, 377 U.S. 463, 467-468.

It is therefore respectfully submitted the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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